

although such was the sense given to the words in the church.

The law contained no specification of the mutual rights and duties of the spouses. These were set by the mores and varied very

greatly in Roman history. *Affectus maritalis* (the disposition of a husband to a wife) and *honore pleno deligere* (to distinguish with complete honor) are alone emphasized as features of marriage which distinguished it from concubinage.<sup>1</sup> Roman jurists took

marriage as a fact, for at Rome from the earliest times, it had been a family matter, developed in the folkways. The civil law defined the rights which the state regarded as its business in that connection, and which it would, therefore, enforce.<sup>2</sup>

422. Roman "free marriage." The passages quoted in the last paragraph refer to "free marriage" <sup>1</sup> after the *mantis* idea had been lost. They could be applied also to the German notion of marriage after the Germans abandoned the *mund* idea.

They also correspond to the Greek view of marriage, for in

Greece the authority of the father early became obsolete in its despotic form. From the time of Diocletian the woman who was

*sui juris* was a subject of the state without intermediary, just as her brother or husband was, and she enjoyed free disposition of herself. The same view of marriage passed into the Decretals of Gratian and into our modern legislation.<sup>3</sup>

423. Free marriage. At the end of the fourth century A.D. the church set aside the Roman notions of the importance of the *dos* and *dona tio propter nuptias*, and made the *consensus* the essential element in marriage. This was an adoption of that form of "free marriage" of the time of the empire which the class from which Christians came had practiced. That is to say, that the church took up the form of marriage which had been in the class mores of the class from which the church was recruited. This is really all that can be said about the origin of "Christian marriage." It is a perpetuation of the mores of the lowest free classes in the Roman world. Justinian reintroduced the *dos* and *donatio* for persons of the higher classes who were, in his time, included in the church. People of the lower class were to utter the *consensus* in a church before three or four clergymen, and a

<sup>1</sup> Cf. Freisen, 26.  
*Rom. Ehe.*, 9.

<sup>2</sup> Rossbach,  
<sup>8</sup> *Ibid.*, 62.